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IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1953

No. [redacted] 49

WILLIAM J. OPPER,

Petitioner.

v.

UNITED STATES OF AMERICA

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

JOHN M. KELLEY, JR.
803 First National Bank Building
Miami, Florida
Counsel for the Petitioner

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Vashington 6, D. C.

DEFENDANTS' EXHIBIT A-1

(Page Eighty-three)

10-12-50
AF16916

ESTIMATE PROCUREMENT MATERIALS FOR SUSTENANCE KIT — Type E-1

All prices quoted as of October 12, 1950

ITEM	DESCRIPTION	PRICE
1	Axe	$ 2.71
	(Axe purchased in Canada, subject to 45% duty Sheath subject to 12½% duty Axe Actual cost.....$1.42 Sheath ..... .58 Both articles complete with duty $2.71)	
2	Sleeping Bag	36.50
3	Gillette Razor Blades (20)	.57
4	Mukluk Boot	4.90
5	Plumbers Candle	.07
6	Cartridges	G.F.E.
7	Chamois Skin	.10
8	Magnetic Compass	.48
9	Lensatic Compass	5.00
0	Plastic Water Container	1.00
1	Bail-Out Container ("Buchsbaum make")	15.90
2	File	.25
3	Fishing Kit	6.50
4	First-Aid Kit	1.515
5	Food Packets	G.F.E.
6	Fuel Ration Heating (2)	.14
7 & 18	Glove N3 and Glove N2	3.85
9	Flying Gloves	1.25
0	Ski Mountain Goggle Type 1	
	Pure Estimate	5.00

DEFENDANTS' EXHIBIT G

ROUTING AND RECORD SHEET
AIR MATERIEL COMMAND

Subject: Goggles, Ski, for Survival Kit

To: MCREXD-7 From: MCREXD-8 Date: 6 Feb 51
Comment No. 1

Attn: Mr. R. G. Hollifield

Subject item has been tested and satisfactorily meets the optical requirements as stipulated in Specification No. JAN-G-1134.

J. W. Heim
Chief, Physiology Branch
Aero Medical Laboratory

FM/pal
2-8242
Bldg 29

CONCURRENCE

F. Moss, MCREXD-8
O. T. Strand, MCREXD-8
J. W. Heim, MCREXD-8

DEFENDANTS' EXHIBIT U

Defendant U Exhibit

UNCLASSIFIED

Physics Lab

SUBORDER

MC 51-27

1. Participating Comp.	2.	3.	4. Project No.
MCREXM Attn: Mr. Handmacker			S-690-11
5. Project Title		**6. AMC Form No. 67** ☐ Has ☒ Has not been initiated	**7. Date**
Goggles and Sun glasses			24 January 1951
8. Highest Security Classification of Project ☐ Top Secret ☐ Secret ☐ Restricted ☐ ABC Restricted Data ☐ Confidential ☒ Unclassified		**9. M.P. Tech. Objective** PO-12	**10. M.P. Import. Rating** B
		11. Priority 3-A	
		12. Date Completion Req'd	**13. T. I. or Directive Ref.**
14. Major End Item		**15. Major Component**	

16. PR. 19264 **DESCRIPTION OF WORK**

To cover necessary time and material for comparison of the optical characteristics of the submitted lenses with Specification No. JAN-G-1134 by spectrophotometry or other stipulated methods.

MARCH 1951

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IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1953

No._____

WILLIAM J. OPPER,

Petitioner.

v.

UNITED STATES OF AMERICA

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

Petitioner, William J. Opper, prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Sixth Circuit (R. II, 765) affirming the conviction of petitioner as to Counts 1, 4 and 5 of the indictment.

OPINION BELOW

The opinion of the Court of Appeals (R. II, 766) has not yet been reported.

JURISDICTION

The judgment of the Court of Appeals was entered on March 26, 1954 (R. II, 765). The jurisdiction of this Court is invoked under 28 U.S.C. § 1254 (1). See also Rules 37 (b) (2) and 45 (a), F. R. Crim. P.

QUESTONS PRESENTED

1. Whether there was a lawful verdict where, during the poll of the jury, a juror repeatedly answered that he "guessed" it was his verdict, and the trial judge, without directing that the jury retire to deliberate further, repeatedly insisted that the juror answer "yes" or "no" until the juror finally made an affirmative answer.

2. Whether, where a juror's answer during the poll indicates only a qualified concurrence in the verdict, his affidavit is admissible to explain the meaning of his qualified answer.

3. Whether, where an admission is made to law enforcement officers after the date of the acts charged as crimes, it is to be so far treated as a confession that, in the absence of corroboration, it is inadmissible.

4. Whether a conviction can be sustained where there is, apart from an admission made to law enforcement officers after the date of the acts charged as crimes, no proof of the *corpus delicti*.

5. Whether, in convicting petitioner the jury, and in sustaining his conviction the court below, in fact admitted, as against him, statements of his co-defendant which, as a matter of law, were not competent evidence against him.

STATUTES AND RULE INVOLVED

The pertinent statutes and Federal Rule of Criminal Procedure involved are set forth in Appendix A, *infra*, pp. 23-25.

STATEMENT

Petitioner William J. Opper and Robert George Hollifield, Sr., were jointly charged, in an indictment (R. I, 1) containing four substantive counts and a conspiracy count, with violating Title 18, U.S.C., § 281 and conspiring to violate § 281 and to defraud the United States within the meaning of Title 18, § 371. Count 1 of the indictment in substance charged that Hollifield, an employee of the United States, directly agreed to receive $1750 as compensation from petitioner for services to be rendered in relation to purchase requests in which the United States was directly interested, the services to consist of Hollifield's recommending the approval and procurement by the Air Force of the United States of certain types of sun goggles and ski goggles. Count 2 charged that on March 1, 1951, in Dayton, Ohio, Hollifield received from petitioner as compensation for the rendition of such services $50. Count 3, a charge similar to Count 2, set forth the receipt by Hollifield from petitioner of $250 on or about March 1, 1951, while Count 4, a charge similar to Counts 2 and 3, recited the receipt of approximately $200 from petitioner under similar circumstances on the 5th day of August, 1951. As to each of these counts it was charged that petitioner aided, abetted, counseled, induced and procured the defendant Hollifield unlawfully to receive such compensation for the services rendered. Title 18, U.S.C., § 2.

Count 5 charged petitioner and his co-defendant Hollifield with conspiring to commit offenses against the United States and to defraud the United States by conspiring to violate Title 18, U.S.C., Section 281, and to defraud the United States within the meaning of Title 18, U.S.C., Section 371, in that (1) they did conspire to cause Hollifield to directly receive from Opper compensation for services rendered and to be rendered by Hollifield which services would consist in Hollifield's recommending the approval and procurement by the Air Force of certain types of sun goggles and ski goggles, and (2) they did conspire to defraud the United States of and concerning its right (a) to have the lawful functions of Hollifield performed free from unlawful impairment, obstruction, collusion, partiality, improper influence, bias, dishonesty and fraud, and (b) to have Hollifield's duties performed untainted by the unlawful receipt by him of compensation from outside sources for services rendered in connection therewith. Count 5 charges that the alleged conspiracy began on or about October 1, 1950 and ended on or about September 26, 1951.

A motion for severance was denied (R. I, 14, 15) and the defendants were tried together.

The evidence established that Hollifield was employed by the United States Air Force at Wright Field, Dayton, Ohio, being a designer supervisor (aviation clothing and equipage). In this position he worked under the general supervision of the Chief, Medical Specifications Branch, with opportunity for "wide use of creative initiative and independent judgment in planning and supervising the accomplishment of land survival equipment." His duty was to review and discuss first samples produced "to de-

termine compliance with specifications." As project supervisor of survival kits, it was Hollifield's duty to pass upon the conformity to specifications of the various items in the kit, including goggles (Govt. Ex. 15, R. I, 86-88; R. III, 49-51).

A resident of Chicago and sub-contractor on various projects for the equipping of survival kits, petitioner submitted to two prime contractors compasses and goggles for the kits (Govt. Ex. 21, R. I, 135; R. III, 68-72; Govt. Ex. 30, R. III, 85-90; R. II, 609, 610). It was proved that certain goggles which had been supplied by petitioner to a prime contractor had been recommended for rejection by the Chief, Physiology Branch Aero Medical Laboratory, on January 23, 1951, because of "marked deviations" from the applicable specifications (Govt. Ex. 27, R. III, 80).

Shortly after the recommended rejection Hollifield secured a conference with Frederick Moss, a project engineer of the Physiology Branch, and other employees of the Air Force (R. I, 377, 378). Petitioner attended this conference and in his presence Hollifield urged that the goggles be accepted (R. I, 378). At the conference it was concluded that Hollifield should embody his reasons for recommending acceptance in a routing and record sheet and this was done (R. I, 378-379). The routing and record sheet (Govt. Ex. 28-a, R. III, 81) stated: "Confirming conversation between Messrs. F. Moss and O. Strand of your Branch and Messrs. R. Hollifield and N. Murray of Medical Specialties Branch, it would be appreciated if your office would reconsider the use of the goggles submitted to determine their conformity with subject item, in view of the following information." While the routing and record sheet was signed by Randall W. Briggs, it bore the

initials of Hollifield and, in asking for reconsideration, stated substantially the reasons Hollifield had advanced at the oral conference above described as to why the rejection of the goggles should be changed (Govt. Ex. 28-a; R. III, 81; R. I, 378). Reconsideration was granted and the use of the substitute goggles submitted by appellant was recommended on February 3, 1951 (Govt. Ex. 28-b; R. III, 82; R. I, 380-382).

Over the objection of the petitioner, Francis A. Regan, a Special Agent of the F.B.I., was permitted to testify concerning certain inculpatory oral statements allegedly made to him by petitioner concerning the payment of money by petitioner to the co-defendant Hollifield (R. I, 322-324). Petitioner objected, unsuccessfully, to such testimony upon the grounds that the government had not introduced any independent evidence of the *corpus delicti*[1] corroborating petitioner's inculpatory statements or admissions (R. I, 238, 240, 245, 322). The testimony of Agent Regan was that on October 10, 1951, petitioner, in the Chicago office of the F.B.I., stated, among other things, that while in the office of a business associate in Dayton, Ohio, he met the co-defendant Hollifield; that thereafter he met Hollifield on approximately fifteen occasions at Wright Field, Ohio, at Dayton, Ohio, and at Chicago, Illinois (R. I, 322); that in April, 1951, during a meeting in Chicago, Hollifield asked for money, stating he was about to lose his home; that he gave Hollifield $1000.00; that such payment constituted a loan; that petitioner admitted he had never seen Hollifield's home, that to his own knowledge he did not know that he had a home, that he did not obtain any security for the loan; that he had no receipt

[1] e. g., That petitioner had paid or agreed to pay money to Hollifield for services rendered or to be rendered.

or record to evidence the loan and that there was no agreement as to interest; that approximately two weeks following the $1000.00 payment in Chicago he met Hollifield in Dayton, Ohio, and gave him $200.00 (R. I, 323, 324).

Over petitioner's objections, upon the same grounds noted above (R. I, 326), there was admitted in evidence against petitioner (R. I, 326) a written statement signed by petitioner (Gov. Ex. 41; R. III, 101) in which petitioner, among other things, admitted paying 1200.00 to Hollifield.

There were also admitted in evidence (R. I, 264, 265, 289) against the co-defendant Hollifield, two signed confessions (Govt. Ex. 37; R. III, 97, and Govt. Ex. 38; R. III, 99). There was also admitted and read into the record, against the co-defendant Hollifield, his grand jury testimony (R. I, 299) as well as testimony concerning oral statements made by him, (R. I, 208, 255-278, 282-295) most of which contained admissions of an inculpatory nature.

Neither the signed confessions, the grand jury testimony nor the oral inculpatory statements of the co-defendant Hollifield was admitted against petitioner and the court admonished (R. I, 260, 268) and instructed (R. II, 721, 722) the jury that such evidence might be considered against Hollifield alone and not against petitioner.

At the close of the Government's evidence (R. II, 549) petitioner moved, unsuccessfully, to strike from the record the written statement signed by him (Govt. Ex. 41; R. III, 101) and the testimony concerning oral inculpatory statements allegedly made by him (R. I, 322-324) upon the

19 MARCH 1951

AA-4

Continued on reverse side ☐

FOR USE OF RESPONSIBLE COMPONENT

17. Project Engineer	18. Branch Chief	19. Approved—Lab. or Sect. Chief
Frederick Moss FREDERICK MOSS Symbol MCREXD8 Phone 2-6242	J. W. HEIM Symbol MCREXD8 Phone 2-3231	R. L. King 33125 R. L. KING, Chief, Service Br. for: W. A. CARLSON, Col, USAF (MC Date

FOR USE OF PARTICIPATING COMPONENT

20. Est. Comp. Date	21. Project Engineer	22. Work will be accomplished under Basic Field No.	23. Approved—Lab. or Sect. Chief
	Symbol Phone		

CLOSING ACTION

24. Report No.	26. Review	27. Approved—Par. Comp. Chief	28. Approved—Resp. Comp. Chief
MCREXD8	☒ Completed	M. E. DORTE Lt. Colonel, USAF Chief, Materials Laboratory	W. A. CARLSON Colonel, USAF (MC) Chief, Aero Medical Lab.
25. Date Completed 3-15-57	☐ Cancelled		

AMRD Form No. 74-69 Apr 50
Air Force MCREXD-8-47 1 Apr 50

UNCLASSIFIED

Supersedes AMRD Forms No. 73A, 73B, and 73C, which will be destroyed.

grounds that, absent his inculpatory statements and admissions, there was in the record no evidence whatsoever, competent as to him, concerning the payment of money to Hollifield or of an agreement so to pay money. At the same time petitioner moved, unsuccessfully, for judgment of acquittal upon the same grounds. At the close of all the evidence petitioner's motions aforesaid were renewed and overruled (R. II, 674).

On the afternoon of June 5, 1952, the foreman of the jury reported to the Court that the jury was unable to arrive at a verdict, whereupon the Court directed that the jury continue its deliberations (R. II, 738). At 5:18 P.M., on June 5, 1952, the Court directed the bailiff to bring in the jury, whereupon the bailiff related that the jury desired a few more minutes, and at 6:00 P.M., the jury returned verdicts finding petitioner and his co-defendant Hollifield guilty on each of the five counts of the indictment (R. I, 20). On motion of petitioner, the jury was polled, and the following interchange took place between the court, juror No. 6, Mr. Raymon Marker, and counsel for the petitioner (R. II, 741-743):

"The Clerk: Raymon Marker, is this your verdict as to Robert G. Hollifield?

Mr. Marker: I signed the paper.

The Court: That is not the answer. Is that your verdict? You may say yes or no.

Mr. Marker: I guess it is.

The Court: That is not the answer. The question is, is that your verdict? You may say yes or no.

Mr. Kelley: If your Honor please, the defense moves that this jury be sent back for further deliberation, sir.

The Court: You may answer the question, Mr. Marker, whether that is your verdict, yes or no.

Mr. Marker: Yes, I guess.

The Court: Mr. Marker, will you answer the question? Please state whether or not that is your verdict as to Robert Hollifield. Answer it yes or no.

Mr. Marker: (Hesitates) Can't I say, 'I guess'?

The Court: No, Mr. Marker, you can't say 'I guess'. You will have to say—you are being polled now and the question is whether or not this is your verdict. You must say, 'Yes, it is,' or 'No, it is not', whichever you see fit to say. It must be one or the other. You can't guess at it.

Mr. Kelley: In justice name—

The Court: Pardon me, Mr. Kelley. I am running this court. Please be seated. You answer the question yes or no, Mr. Marker, as you see fit. That is up to you.

Mr. Marker: Yes.

The Court: All right. Go to the next juror.

Mr. Kelley: May the record show the time that has taken place before this Gentleman expressed himself?

The Court: The record may show anything you please.

Mr. Kelley: May the record show many minutes passed?

The Court: I wanted to know from Mr. Marker whether this was his verdict and he said: 'Yes, it is.'

Mr. Kelley: May the record show before he responded many minutes passed and may it show that the juror has bent his head in great perturbation? May the record show that the juror is now in tears?

The Court: You will have everybody in tears, if you keep on.

Mr. Kelley: If your Honor please, may all of these remarks go upon this record?"

When polled but a few moments later as to petitioner Opper, juror Marker responded (R. II, 744):

"The Clerk: Raymon J. Marker, is this your verdict as to William J. Opper?

Mr. Marker: I said it once. Yes, Yes it is."

Thereafter, on June 10, 1952, petitioner timely filed a motion for a new trial with an attached affidavit of juror Raymon J. Marker (R. I, 21, 24). In this affidavit (R. I, 24) juror Marker, among other things, deposed:

> "In the last few minutes before the jury left the Jury Room to report its verdict,I changed my vote from "Not Guilty" to "Guilty"; one other juror was also voting for acquittal up to the last half hour. It had been intimated by two of the jurors that I had some ulterior reason for my voting. Also the Court, on the first day of the trial censored a prospective juror in severe terms for not saying earlier that he could not serve for personal reasons. I signed the verdict of "Guilty", but when I was seated in the jury box and was asked individually if it was my verdict I wanted to speak out that it was not my conscientious verdict, but I was afraid the Court would censor me or hold me in contempt of court for changing my verdict after having signed it. My conscience bothered me afterward and I sought our Harold H. Shellenberger and told him of my situation. I give this affidavit in the interest of justice and to clear my conscience."

On June 16, 1952, petitioner filed a supplemental affidavit of juror Raymon J. Marker (R. I, 25), and orally moved that the Court conduct an investigation of its own whereby all of the jurors could be interrogated as to the occurrences set forth in the affidavit and supplemental affidavit of juror Raymon J. Marker (R. II, 749).

In the supplemental affidavit juror Marker deposed:

> "Affiant says that one of the jurors in the above entitled case, at a late stage in the deliberations, demanded to know of him, 'What's in this for you?' or words to that effect; and that upon violent protest of affiant against this remark another juror said 'If the shoe fits wear it', or words to that effect.
>
> "Affiant says that he felt that he was under strong suspicion of corrupt motives in voting for acquittal; that several of his fellow jurors were extremely critical of his position.
>
> "Affiant says that the verdicts he signed were not his true verdicts and that he signed said verdicts under pressure."

The trial court, on its own motion, ordered the aforesaid affidavits stricken from the record upon the ground that they were "highly and extremely impertinent" (R. II, 755, 756).

Petitioner, on June 16, 1952, was sentenced to imprisonment for a period of two years on Count One; one year on Count Four, the sentence on Count Four to run consecutively with the sentence on Count One; one year and one day on Count Five, the sentence on Count Five to run concurrently with the sentences on Counts One and Four; to pay a fine of $500.00 on Count Two and $500.00 on Count Three (R. I, 29).

The judgment of the court below reversed the judg-

ment of the trial court as to Counts Two and Three of the indictment, affirmed as to Counts One, Four and Five and remanded the case to the District Court with instructions to dismiss Counts Two and Three of the indictment (R. II, 765, 772).

REASONS FOR GRANTING THE WRIT

This case raises significant—and disturbing—issues of criminal law that invite further scrutiny by this Court.

First, the facts reflect an improper invasion of the jury's province by the trial judge, since, although the poll showed that one juror was not in complete accord with the verdict as announced, the trial judge questioned him until a categorical answer was forthcoming. Another circuit, and every other court considering the point, has ruled that the proper course would have been a direction to the jury to retire for further deliberation.

Next, the court below ruled that an admission, unlike a confession, does not require corroboration, even when made after the fact in response to interrogation by F.B.I. agents. A recent decision here, which dispenses with corroboration only where the admission was made before the crime, looks the other way; and at least two other circuits are squarely to the contrary.

Third, the court below has upheld a conviction solely on the strength of an admission, made after the fact, without any proof of the *corpus delicti*. Every other circuit before which that question has come has unhesitatingly ruled that there must be proof, independent of such admission, of the *corpus delicti*.

And, finally, this case presents still another demonstration of the primary danger of conspiracy prosecution, viz., the impossibility in fact of protecting one defendant from the incriminatory features of confessions by his co-defendant, notwithstanding repeated admonitions that the confessions of one are inadmissible against the other.

1. A serious aspect of the present case lies in the approval given by the court below to the procedure followed by the trial judge during the poll of the jury, whereby the juror Marker, who manifestly was not ready to give his unqualified or unequivocal adherence to the verdict, was eventually induced to express his consent thereto, not as a consequence of further deliberation with his fellow jurors, but by reason of the repeated and peremptory insistence of the trial judge that he respond to the poll with a categorical answer. The ruling below on this point appears to ignore Rule 31(d), F. R. Crim. P., is directly contrary to the ruling of at least one other circuit (and of all other courts that appear to have passed on the issue), is at marked variance with hitherto approved concepts of a unanimous verdict, and lends sanction to a disturbing departure by the trial court from the accepted and usual course of proceedings in criminal cases.

The sequence of events during the poll (R. II, 741-744) has been set out above, *supra*, pp. 8-11. Juror Marker's first response, "I signed the paper", most certainly cannot be termed an unqualified assent. His next three responses to questions propounded by the judge were all qualified by "I guess" or "I guess it is"—which again show that this juror was not expressing a conviction of guilt beyond reasonable doubt. It was not until after

repeated interrogation by the trial judge that this juror finally gave, after prolonged hesitation, an answer of "Yes"—and simultaneously gave way to tears.

While these external influences were brought to bear upon this juror during the poll as to Hollifield, his answer as to the Opper verdict, "I said it once. Yes, yes it is." (R. II, 744, *supra*, p. 11) is inextricably connected with his series of uncertain answers as to the Hollifield verdict, and the one is as much tainted with coercion as the other.

The answers of juror Marker made in response to the questions asked upon the poll show that he was not in complete agreement with the verdict, or, at the very least, that he entertained grave doubts. Clearly, there was not "unanimous concurrence". Consequently, Rule 31(d), F. R. Crim. P. (*infra*, p. 25), no less than every court passing on the point, makes it clear that the jury should have been directed to retire for further deliberations.

Thus, so the District of Columbia Circuit has held, the judge should not have argued with the juror, he should have sent the entire jury back for further deliberation. *Bruce* v. *Chestnut Farms-Chevy Chase Dairy*, 126 F. 224, 225:

> "There can be no question of the right of a juror, when polled, to dissent from a verdict to which he has agreed in the jury room, and when this happens, the jury should either be discharged or returned to their room for further deliberation. It is both unwise and undesirable that the court should enter into an argument with the

> juror or require an explanation of his change of position. * * * The correct practice, when a poll of the jury is asked, is for the clerk to call the roll and ask each juror as his name is called to answer—for the plaintiff, or—for the defendant, and if the responses of the individual jurors are not in complete agreement, the jury should be required to retire and give further consideration to the case".

Similarly, in *Mattice* v. *Maryland Casualty Co.*, 5 F. 2d 233 (W. D. Wash.), one of the jurors during the poll said, "I submitted; yes". To a further inquiry as to whether it was his verdict, he said, "In a sense it was, yes"; and, thereafter, "I agreed; yes." The jury having been meanwhile discharged, Judge Neterer granted a new trial "upon the ground of the failure of the jury to agree". This decision was cited with approval by the District of Columbia Circuit in the *Bruce* case, *supra;* it would be difficult to find a state of facts closer in point to those in the case at bar.

Likewise, in *Solar* v. *United States*, 86 A. 2d 538, where one juror during the poll said, "I said not guilty and I changed to guilty in a way", and, after a further question by the judge, "Guilty, I suppose", the Municipal Court of Appeals for the District of Columbia, on the authority of the *Bruce* case, held that, when the individual juror expressed doubt, the jurors should have been sent back for further deliberation and that entry of a verdict of guilty was improper.

The opinion of the court below, which disregarded all the preliminary colloquies between the judge and juror

Marker, and simply said (R. II, 772), "The juror Raymon J. Marker three times stated in open court that the verdict was his", is not in accord with Rule 31(d), and is moreover squarely opposed to the ruling of the District of Columbia Circuit in the *Bruce* case, *supra*.

2. If review is granted as to the foregoing point, petitioner also intends to argue that it was error to strike the juror Marker's affidavits from the record (*supra*, p. 12). Without elaborating at this juncture, the contention to be made is that, while a juror may not impeach his own verdict, he may by affidavit explain a qualified assent such as "Yes, but—" (*In re Sugg's Will*, 194 N. C. 638, 140 S. E. 604), or indicate possible coercion by the court (*State* v. *Joseph*, 96 N. E. 2d 425 (Ohio App.). That is because, in the absence of unqualified assent by every juror, there is no verdict in existence, and hence nothing to impeach. This result is consistent with what this Court has said of the object of a poll (*Humphries* v. *District of Columbia*, 174 U. S. 190, 194), "to ascertain for a certainty * * * that no one has been coerced or induced to sign a verdict to which he does not fully assent", and with what it has said of impeaching affidavits by jurors (*United States* v. *Reid*, 12 How. 361, 366): "It would perhaps hardly be safe to lay down any general rule upon this subject. Unquestionably, such evidence ought always to be received with great caution. But cases might arise in which it would be impossible to refuse them without violating the plainest principles of justice".

3. Where an admission is made prior to the time of the alleged crime, it need not, under a fairly recent decision of this Court, be corroborated, because before-the-fact admissions "contain none of the inherent weaknesses

of confessions or admissions after the fact". *Warszower* v. *United States*, 312 U. S. 342, 347.

Here, all of petitioner's admissions were made after the fact. The dates alleged in the indictment that have reference to him run from October 1, 1950, to September 26, 1951 (R. I, 2, 3, 4-5, 6). His written admission (Govt. Ex. 41, R. III, 101-102; R. I, 329-331; R. II, 769-771) is dated October 16, 1951. And all of his oral admissions (R. I, 320-325, 332-333, 337-351) to the two F.B.I. agents who interrogated him were similarly made in October, 1951 (R. I, 318, 337-338, 348).

Yet the court below held (R. II, 771) that these admissions did not require corroboration.

The holding below, far from being required by the *Warszower* case, runs counter to the rationale of that decision as to the danger of after-the-fact admissions; and it is in addition in conflict with the rule followed by the other circuits that have considered the issue. *Calderon* v. *United States*, 207 F. 2d 377 (C.A. 9); *Pines* v. *United States*, 123 F. 2d 825 (C.C.A. 8); *Gulotta* v. *United States*, 113 F. 2d 683 (C.C.A. 8).

We think that the reasoning of the *Warszower* case, which analogizes after-the-fact admissions to confessions with respect to the need for corroboration, requires reversal of the judgment below; but, insofar as the question may still be open here, the existing conflict between the court below and the 8th and 9th Circuits warrants review of this case for reexamination of the underlying issue.

4. There is a further infirmity in the ruling below,

viz., the affirmance of petitioner's conviction on his after-the-fact admission alone, without any proof whatever of the *corpus delicti*.

Under the allegations of the substantive counts of the indictment, 1-4 inclusive, the elements of the *corpus delicti* are (1) the payment of money or an agreement to pay money to Hollifield for (2) services rendered or to be rendered by Hollifield to the petitioner; and in count 5, the conspiracy count, the *corpus delicti* is of course the agreement. Cf. R. II, 544-549.

Eliminating what petitioner himself said, because the inquiry is whether what he said was corroborated—eliminating what Hollifield said, for that admittedly (R. II, 769), cannot be considered against petitioner—there is in the record neither evidence of payment nor evidence of an agreement to pay, as we show, in greater detail, in Appendix B, *infra*, pp. 26-29.

Otherwise stated, there is in the present record no proof of any *corpus delicti* apart from the statements of the two defendants.

The differences of opinion between the several courts of appeal as to the quantity or degree of extra-confessional proof of the *corpus delicti* that is required [compare *Daeche* v. *United States*, 250 Fed. 566 (C.C.A. 2), with *Forte* v. *United States*, 94 F. 2d 236 (App. D. C.)] need not be resolved here, because, at the very least, the independent evidence must establish that the crime charged has been committed by someone [*United States* v. *Markman*, 193 F. 2d 574, 576 (C.A. 2); *Anderson* v. *United States*, 124 F. 2d 58 (C.C.A. 6)], and that minimum standard has not here been met.

Thus, in this case, the court below has affirmed a conviction, without independent proof of the *corpus delicti*, simply on the basis of what a defendant said and wrote to F. B. I. agents after the date of the acts charged. That result is in square conflict with the decisions of every other circuit which has up to now passed on that question. *Tingle* v. *United States*, 38 F. 2d 573, 575 (C.C.A. 8); *Naftzger* v. *United States*, 200 Fed. 494, 499 (C.C.A. 8); *Calderon* v. *United States*, 207 F. 2d 377 (C.A. 9); *Forte* v. *United States*, 94 F. 2d 236 (App. D. C.); *United States* v. *Markman*, 193 F. 2d 574 (C.A. 2); see *United States* v. *Golan*, 24 F. Supp. 523 (E.D. Pa.) (Maris, Circ. J.).[2]

Never, before the decision below, has any circuit ever ruled that a conviction can be had where the essential elements of the offense were proved only by things said by a defendant after the date of the offense charged. Even in the absence of a conflict between circuits, such a result marks a sufficient departure from hitherto accepted principles as to call for review by this Court.

5. Opinions here have several times reflected an awareness of the dangers implicit in conspiracy prosecutions. See *Krulewitch* v. *United States*, 336 U. S. 440, 445-458; *Nye & Nissen* v. *United States*, 336 U. S. 613, 625-626. The fears there voiced are shown by this record to have been well founded.

The trial judge repeatedly admonished the jury that the statements of the co-defendant Hollifield could not be used against petitioner (R. I, 260-261, 268-269,

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[2] *Perovich* v. *United States*, 205 U. S. 86, 91, relied upon by the court below (R. II, 769), holds that an admission is competent when the *corpus delicti* is independently proved, not that an admission standing alone dispenses with proof of the *corpus delicti*.

290; R. II, 444, 722). Yet the jury was still so far confused as to find petitioner guilty on Counts 2 and 3 (R. I, 20), although, as the court below held (R. II, 772), the only evidence connecting petitioner with the payments alleged in those counts was the statement of Hollifield. And the trial judge, for all his learning, was himself also so confused that, despite the absence of competent evidence against petitioner on those counts, he denied a motion for a judgment of acquittal as to these counts (R. I, 18, 19), overruled a motion for new trial (R. I, 27), and imposed sentence in respect of each of the invalid counts (R. I, 29).

Error begets error. Although the court below set aside the conviction on Counts 2 and 3 (R. II, 765, 772), it was itself similarly confused as to what evidence was admissible against petitioner, as we point out in more detail in Appendix B, *infra*, with the consequence, already demonstrated, that petitioner's conviction on the remaining counts has been affirmed without any competent independent proof of the *corpus delicti*.

It is commonplace in psychology that the ability of the human mind to compartmentalize and insulate particular bits of knowledge is limited. But where that inability has dire consequences to an individual, where the mind's inability to apply fact A only to defendant X actually makes that inadmissible evidence seal the doom of defendant Y, we pass from the realm of psychology to that of law. And where the confusion of evidence affects not only lay jurors but also "the distinguished and experienced trial judge who heard the case" (R. II, 769), and is shown moreover to have infected the very reasoning of an entire court of appeals, then, we submit, it is appropriate for this

Court to grant review, to the end that the abuses which the present record reflects be remedied, and their repetition precluded.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that this petition for writ of certiorari should be granted.

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APPENDIX A

STATUTES AND RULE INVOLVED

Title 18, Section 281, United States Code. *Compensation to Members of Congress, officers and others in matters affecting the Government.*

Whoever, being a Member of or Delegate to Congress, or a Resident Commissioner, either before or after he has qualified, or the head of a department, or other officer or employee of the United States or any department or agency thereof, directly or indirectly receives or agrees to receive, any compensation for any services rendered or to be rendered, either by himself or another, in relation to any proceeding, contract, claim, controversy, charge accusation, arrest, or other matter in which the United States is a party or directly or indirectly interested, before any department, agency, court martial, officer, or any civil, military, or naval commission, shall be fined not more than $10,000 or imprisoned not more than two years, or both; and shall be incapable of holding any office of honor, trust, or profit under the United States.

Retired officers of the Army, Navy, Marine Corps, and Coast Guard of the United States, while not on active duty, shall not by reason of their status as such be subject to the provisions of this section. Nothing herein shall be construed to allow any retired officer to represent any person in the sale of anything to the Government through the department in whose service he holds a retired status.

This section shall not apply to any person because of his membership in the National Guard of the District of

Columbia nor to any person specially excepted by Act of Congress.

Title 18, Section 2, United States Code.

Principals.

(a) Whoever commits an offense against the United States, or aids, abets, counsels, commands, induces, or procures its commission, is a principal.

(b) Whoever causes an act to be done, which if directly performed by him would be an offense against the United States, is also a principal and punishable as such.

Title 18, Section 371, United States Code. *Conspiracy to commit offense or to defraud United States.*

If two or more persons conspire either to commit any offense against the United States, or to defraud the United States, or any agency thereof in any manner or for any purpose, and one or more of such persons do any act to effect the object of the conspiracy, each shall be fined not more than $10,000 or imprisoned not more than five years, or both.

If, however, the offense, the commission of which is the object of the conspiracy, is a misdemeanor only, the punishment for such conspiracy shall not exceed the maximum punishment provided for such misdemeanor.

Federal Rules of Criminal Procedure

Rule 31. *Verdict.*

(a) Return. The verdict shall be unanimous. It shall be returned by the jury to the judge in open court.

* * * * *

(d) Poll of the Jury. When a verdict is returned and before it is recorded the jury shall be polled at the request of any party or upon the court's own motion. If upon the poll there is not unanimous concurrence, the jury may be directed to retire for further deliberations or may be discharged.

APPENDIX B

SUMMARY OF EVIDENCE BEARING ON THE CORPUS DELICTI

What follows is a documentation of an assertion in the body of the petition (*supra*, p. 21) that there is in the present record no evidence independent of petitioner's after-the-fact admissions proving the *corpus delicti*.

1. The court below, in summarizing the evidence stated in its opinion (R. II, 767, 768) that petitioner, a sub-contractor on various projects for the equipping of survival kits[1] submitted to two prime contractors com-

[1] A comprehensive article made up of a number of components such as a compass, raincoat, goggles, machette and necessary life saving equipment. (R. I, 129)

passes and goggles for the kits; that certain goggles which had been supplied by petitioner to a prime contractor had been recommended for rejection by the Chief, Physiology Branch, Aero Medical Laboratory, on January 23, 1951 because of "marked deviations" from the applicable specifications; that petitioner's co-defendant, Hollifield, was employed by the United States Air Force at Wright Field, Dayton, Ohio, being a designer supervisor (aviation clothing and equippage); that he worked in this position under the Chief, Medical Specifications Branch, with opportunity for "wide use of creative, initiative and independent judgment in placing and supervising the accomplishment of land survival equipment"; that his duty was to review and discuss first samples produced "to determine compliance with specifications"; that as project supervisor of survival kits, it was Hollifield's duty to pass upon the conformity to specifications of the various items in the kit, including goggles; that shortly after the recommended rejection Hollifield secured a conference with Frederick Moss, a project engineer of the Physiology Branch, and other employes of the Air Force; that petitioner attended this conference and in his presence Hollifield argued that the goggles be accepted; that at the conference it was concluded that Hollifield should embody his reasons for recommending acceptance in a routing and record sheet and this was done; that the routing and record sheet stated: "Confirming conversation between Messrs. F. Moss and O. Strand of your Branch and Messrs. R. Hollifield and N. Murray of Medical Specialties Branch, it would be appreciated if your office would reconsider the use of the goggles submitted to determine their conformity with subject item, in view of the following information"; that while the routing and record sheet was signed by Randall W. Briggs, it bore the initials of Hollifield and, in asking

for reconsideration, stated substantially the reasons Hollifield had advanced at the oral conference above described as to why the rejection of the goggles should be changed; that reconsideration was granted and the use of the substitute goggles submitted by appellant was recommended on February 3, 1951.

2. Petitioner acknowledges that the evidence summarized immediately above was adduced from sources independent of petitioner's inculpatory admissions. But petitioner submits that none of such evidence establishes or could give rise to a reasonable inference that anyone, petitioner included, paid or agreed to pay money to Hollifield—and it is the payment or agreement to pay that constitutes the *corpus delicti* in this case.

3. The court below, in its summary of the evidence (R. II, 767) further stated that "appellant had been acquainted with Hollifield for several months, having met him in October, 1950, and having seen him some fifteen times during the period involved."

In fact, however, there is no independent evidence that petitioner saw Hollifield some fifteen times during the period involved. The sole source of this statement is the testimony of Francis A. Regan, Special Agent of the F.B.I., who testified (R. I, 322) that petitioner orally admitted to him that he met Hollifield on approximately fifteen occasions. Petitioner acknowledges that the record does contain independent evidence that on a single occasion (January 23 or 24, 1951) he attended a meeting at Wright Field at which meeting there were present Hollifield, Norris N. Murray, O. T. Strand and F. Moss (the latter three being officers at Wright Field) and a sixth

man whose identity was not disclosed (R. I, 377, 378). Apart from the inculpatory statements of Hollifield, which may not be considered against Opper for any purpose, and apart from Opper's inculpatory admissions there is no evidence whatsoever in the record that Opper and Hollifield ever met save and except for the one meeting of January 23 or 24, 1951, noted above, attended by Strand, Murray, Moss and the unknown man.

4. The court below in its summary of the evidence (R. II, 767) referring to the rejection of certain goggles supplied by petitioner, recited further: "Hollifield, as admitted by appellant, had discussed this matter with appellant." There is in the record of the case no independent evidence of such discussion.

5. In addition to the evidence thus summarized by the court below, there were but three items of independent evidence, which might be said to relate remotely, if at all, to the payment of money, viz.,

a) That on April 14, 1951, Hollifield went to the City of Chicago (R. II, 420-423);

b) That on April 13, 1951, a telephone call was made from the Hollifield residence in Dayton, Ohio, to the Opper residence in Chicago (R. I, 414; R. II, 417); and

c) That a check for $1000.00 was drawn by Opper on April 13, 1951, and was cashed by Opper on April 16, 1951 (R. II, 425-427) (Govt. Ex. 42; R. III, 103; R. I, 333-336, R. III, 426).

But, (a) There is no independent evidence that Hollifield met or communicated with Opper while in Chicago;

(b) There is no independent evidence as to who, if any one, conversed, or whether the conversation related to business or social matters; and,

(c) There is nothing upon said check and no independent evidence to identify said check with Hollifield; Opper's bank ledger sheets (Govt. Ex. 43; R. III, 104-106; R. I, 337) demonstrate that within two and one-half months of April 16, 1951, Opper cashed fifteen other checks amounting to or exceeding $1,000.00. Please note, in this connection, a typographical error appearing at the bottom of page 523 in the Record, which reads: " • • • a check . . . with Hollifield's name on it . . ." and which should properly read: " • • • a check . . . without Hollifield's name on it . . . "

6. Under the crime charged against petitioner in each count of the indictment, the elements of the *corpus delicti* obviously consist of (1) the payment of money or an agreement to pay money to Hollifield for (2) services rendered or to be rendered by Hollifield to petitioner.

Thus it is abundantly manifest that there is in this record no independent evidence that anyone paid or agreed to pay money to Hollifield. Consequently, as was said in the text, (*infra*, p. 21), there is in this record no independent evidence of the *corpus delicti*.